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SERVICE DATE – MAY 31, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36075

ILLINOIS STATE HIGHWAY AUTHORITY—PETITION FOR DECLARATORY ORDER

Decided: May 31, 2017

The Illinois State Toll Highway Authority (Tollway) has sought a declaratory order confirming that, in its effort to acquire permanent and temporary easements for the construction of five highway bridges over railroad tracks owned and operated by Soo Line Railroad Company, d/b/a Canadian Pacific Railway (CP) in Chicago, Ill., the Tollway's exercise of state-law eminent domain authority is not preempted under 49 U.S.C. § 10501(b). The bridges would be one stage of the Tollway's Elgin O'Hare Western Access Project (EOWA Project), a multi-stage project to improve the transportation infrastructure near O'Hare International Airport (O'Hare) by creating access to the western side of O'Hare. CP responded that, if the bridges are in fact built, the EOWA Project—the larger project of which the bridges are a part—would inevitably cross or pass through CP's Bensenville Yard, CP's only rail yard in the Chicago Terminal. CP therefore argued that the proceeding should be broadened to consider whether preemption would also apply to efforts by the Tollway to use eminent domain to take over property in the Bensenville Yard. By order issued on January 17, 2017, the Board instituted a proceeding to consider whether 49 U.S.C. § 10501(b) preempts the Tollway's eminent domain authority to acquire the temporary and permanent easements needed to construct highway bridges over CP's rail tracks, and also to consider the implications of the Tollway's prospective plans to cross or go through the Bensenville Yard.

Although the plans regarding Bensenville Yard have not yet been finalized, that aspect of the project could involve a major incursion into the yard, which Board and court precedent would suggest is preempted if it were to unreasonably interfere with CP's rail operations. See City of Lincoln v. STB, 414 F.3d 858, 861 (8th Cir. 2005). Likewise, whether construction of the bridges would be preempted would depend on the resolution of factual questions related to, for example, the severity and impact of the temporary shutdowns that would likely occur during construction. See E. Ala. Ry.—Pet. for Declaratory Order, FD 35583, slip op. at 6 (STB served Mar. 9, 2012) (construction project that caused some interference with operations not necessarily preempted if carrier could “plan around the construction thereby creating the least disruption to its operations”). And while the support piers for the bridges would encroach on the edge of the carrier's property, whether they would unduly interfere with rail operations is a matter that would have to be decided only after review of all of the facts. See Wichita Terminal Ass'n—Pet. for Declaratory Order, FD 35765 (STB served June 23, 2015) (reviewing substantial record before determining whether preemption applied).

Pursuant to 49 C.F.R. Part 1109, the Board requests that the parties participate in Board-sponsored mediation in this matter. The Board “favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings.” 49 C.F.R. § 1109.1. Mediation can be particularly appropriate when disputes involve operational issues, which typically can be better resolved collaboratively by the private sector than by an imposed solution.

Consistent with the letters the Board has written in response to inquiries from individual Members of Congress on this proceeding, and consistent with CP’s own comments in its letter posted in the docket in this matter on May 19, 2017, mediation here could be useful in helping the parties to resolve this matter in a way that gives the Tollway the ability to improve the O’Hare infrastructure while minimizing the disruption to rail operations.

Accordingly, the Board directs the parties, by June 15, 2017, to confirm whether they will participate in Board-sponsored mediation.

It is ordered:

1. The Board directs the parties, by June 15, 2017, to confirm whether they will participate in Board-sponsored mediation.
2. This decision is effective on the date of service.

By the Board, Rachel Campbell, Director, Office of Proceedings.